

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v. CRIMINAL NO. 04-50 ERIE

JOHN JOSEPH PRICE, JR.

HEARING ON DEFENDANT'S MOTION TO SUPPRESS - DAY NO. 2

Proceedings held before the HONORABLE
SEAN J. McLAUGHLIN, U.S. District Judge,
in Courtroom C, U.S. Courthouse, Erie,
Pennsylvania, on Thursday, May 4, 2006.

APPEARANCES:

CHRISTIAN A. TRABOLD, Assistant United States
Attorney, appearing on behalf of the Government.

THOMAS W. PATTON, Assistant Federal Public

Ronald J. Bench, RMR - Official Court Reporter

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1 P R O C E E D I N G S

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3 (Whereupon, the proceedings began at 10:30 a.m., on
4 Thursday, May 4, 2006, in Courtroom C.)

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6 THE COURT: This is the time that we set for a
7 post-hearing argument at Criminal No. 04-50 Erie. And by way
8 of background, there was a supplemental pleading filed by the
9 defendant and addressed by the government with respect to the
10 search at the garage. Mr. Trabold, I guess you've got the
11 burden here, what do you want to tell me?

12 MR. TRABOLD: Yes, your Honor. I think there are
13 five points raised in the supplemental motion, I'll just kind

14 of take those in order. I won't belabor the point because we
15 have a rather lengthy filing. With regard to the first issue,
16 which is the search of Mr. Price's coat at the time of his
17 arrest. The cases are clear that the issue in the search
18 incident to arrest is the scope of the person's control. And
19 the cases say that it's permissible, even if the arrestee is
20 handcuffed with no access to the area at the time of his
21 arrest.

22 THE COURT: Aren't I bound by Myers, isn't Myers on

23 all-fours here in establishing a geographic and temporal
24 proximity? Here the fellow was handcuffed, he's outside the
25 garage at the time of the search, how do I square that with

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1 Myers?

2 MR. TRABOLD: I don't think you're bound by Myers,

3 because the overwhelming weight of the cases, first from the
4 Third Circuit, as well as the cases from other circuits across
5 the country, is directly the opposite of what Myers holds.

6 Myers, it appears to me anyway, to be out on an island by

7 itself.

8 THE COURT: But it's my island, isn't it?

9 MR. TRABOLD: We appear to be living in the island,

10 your Honor. It just doesn't make -- first of all, the dissent

11 in that case lays out the issue as to the search incident to

12 arrest really isn't, really amounts to be an advisory opinion

13 from the Third Circuit panel in that case. It also points out

14 the fact that it's evident from our brief that there's no

15 citation to even any case law whatsoever in support of the

16 Myers majority's opinion in that case. So our position is that

17 you're not bound by the Myers' opinion because the Myers'

18 opinion, as the dissent points out, lacks precedential value on

19 the issue of search incident to arrest because that decision

20 was not necessary to their disposition of the case.

21 THE COURT: In other words, it was dictum?

22 MR. TRABOLD: Correct, dicta certainly would be an

23 easier way to say that.

24 THE COURT: Okay.

25 MR. TRABOLD: Separate and apart from Myers, the

1 cases are clear, and overwhelmingly so, that in a factual
2 setting of this type that you have before you here today, that
3 that is a lawful search incident to arrest, and really what it
4 amounts to was the item within Mr. Price's control at the time
5 he was arrested, not at the time when the officers may have
6 gone through the bag. The item clearly was within his control.
7 He was arrested in what amounts to be a garage, in the back
8 office of the garage. The bag was in the office of the garage.
9 So the item was clearly --

10 THE COURT: What does the record show on that again.
11 They come in, the garage door is open, as I remember, they go
12 in --

13 MR. TRABOLD: It's my recollection of the record
14 and, obviously, the record is what the record is, but my
15 recollection of record is it's a relatively run of the mill
16 standard size garage. They go into the garage to arrest Mr.
17 Price and he's in kind of the back, there's kind of a back
18 office to the garage, which by it's nature is smaller than the
19 general rest of the outer garage. He's in this back office

20 there, they arrest him in there and that's where the bag is
21 found in that small back office, that's my recollection of the
22 record.

23 THE COURT: All right.

24 MR. TRABOLD: With regard to the issue of whether
25 Ms. Fischer consented to the search of the house in the first

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1 instance. The cases are clear that you have to look at the
2 totality of the circumstances. And my reading, obviously, I
3 don't speak for counsel, but my reading of the defense brief is
4 that really the underpinning of their argument is that the
5 officers used deception when they got her to consent. I would
6 categorically reject that. The officers did not use deception
7 when they got her consent. But perhaps even more importantly,
8 even if you find they did use deception, that in and of itself,
9 the cases hold, is not enough for you to find that there was no
10 consent. You still need to look at the totality of the
11 circumstances. In this case the record is completely void of
12 any indication that anyone coerced Ms. Fischer in even the
13 slightest regard. No weapons drawn, nothing like that. In

14 fact, the officers took the step, when they realized she wasn't
15 home, of calling her. And then when apparently she had some
16 trouble or ran out of gas, they went and brought her to the
17 house. The consent was given in essentially what amounts to
18 the front yard of the house. She has prior experience with the
19 criminal justice system. And is roughly a middle aged,
20 approximately, by my recollection, a 40-year-old woman.

21 THE COURT: Are they in fact married, does the
22 record reflect that, because there's a reference to Mrs. Price?

23 MR. TRABOLD: The record indicates that Mr. Price
24 referred to her as his wife. I don't know if the record takes
25 the additional step, my understanding is the relationship is a

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1 common-law relationship, there's no actual marriage license.
2 But I could be wrong on that, I don't know if the record takes
3 that additional step.

4 THE COURT: So it would be inaccurate to be
5 referring to her as Mrs. Price?

6 MR. PATTON: Your Honor, I think Mr. Trabold is
7 correct insofar as what's in the record, they are not married.

8 THE COURT: They call her Mrs. Price in the record?

9 MR. PATTON: Ms. Fischer and Mr. Price are not
10 legally married. So I believe it's accurate to refer to her as
11 Ms. Fischer.

12 THE COURT: All right. That's fine.

13 MR. TRABOLD: I think what the record does indicate
14 is that when Mr. Price was arrested, he indicated to the
15 officers or made a general request, hey, can somebody try to
16 reach out to my wife and let her know I'm not going to be home
17 because I was supposed to be watching the kids tonight.

18 THE COURT: Tell me your position, factual and
19 legal, in response to the defendant's position that there was a
20 revocation of consent?

21 MR. TRABOLD: Well, I have a variety, a number of
22 different responses to that. Number one, I do not believe the
23 record indicates that there was a revocation of consent. At
24 the most the record indicates that Ms. Fischer limited the
25 scope of her consent when she said, and there is some variance

1 in the record, but as I point out in my footnote, even if you

2 take the statement from Agent Schirra that's most beneficial to
3 Mr. Price and you base your decision on the factual
4 underpinning that Ms. Price or Ms. Fischer said I want you to
5 stop searching upstairs/the house part, even if you accept that
6 as what she said and base your decision on that statement,
7 separate and apart from the dresser drawer statement that Agent
8 Schirra made to you when you questioned him specifically, that
9 is not a revocation of consent. That's a limitation of the
10 scope of her consent, which was well within her rights,
11 obviously, under the case law, a person can either flat out
12 withdraw or revoke their consent or limit the consent. What's
13 illustrative in the record she did not say and there is no
14 indication in the record from either party that at any point in
15 time she just made the general statement I want you to stop
16 searching. Or please leave my property or get out of here now,
17 I'm done. And having not made that statement, by her own words
18 she did not revoke her consent. She merely limited the area in
19 which they could search. And our additional point and perhaps
20 the most important point in our brief is that what then
21 happened is that Agent Schirra honored that limitation,
22 inquired as to the location of the basement, and then was led

23 to the basement by Ms. Fischer. And then provided an entirely

24 new consent to search that area. And the reason I call it a

25 new consent is that the officers did not then just begin to

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1 attempt to access the basement. They asked her anew, is it

2 okay if we go into this area. They didn't just consider that

3 her prior consent was still perfectly valid, perfectly lawful.

4 They went the additional step, asked her anew, attempted to get

5 a new or new permission from her to go into that area, which

6 she did then provide. So even if you were to consider that she

7 revoked that earlier consent, the record is clear that they

8 then obtained, the record again is completely devoid of any

9 coercion whatsoever, that they then went ahead and obtained

10 another consent from her once they were in the basement area.

11 And the record is also clear that her demeanor was not,

12 according to Trooper Wilson, was not of a person whose will was

13 being overborne or who had been intimidated or threatened by

14 Agent Schirra when Trooper Wilson was in another area where he

15 couldn't have heard the conversation.

16 THE COURT: What about this authority issue?

17 MR. TRABOLD: Your Honor, my opinion on the
18 authority issue is that should be the easiest issue for you to
19 resolve in this case. Because the case law is overwhelming
20 clear, from the Duran case, as well as all the other cases that
21 we cited, that a spouse has the presumptive authority to
22 consent and that to consent to what amounts to, I guess the
23 description would be the marital property. In this case the
24 officers, that case law is applicable here because Mr. Price
25 himself referred to Ms. Fischer as his wife. And they were at

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1 a minimum co-habiting in the residence there on Page Road.
2 And the Duran case says the spouse has presumptive authority
3 which may only be rebutted by a showing that the spouse was
4 denied access to the area searched. There's no indication
5 whatsoever that she was denied access to the area searched.
6 In fact, the record indicates that she did the laundry in that
7 area, stored various household items. The thrust of the
8 defense argument is that she didn't have the key. Well, again,
9 in and of itself is not enough to show that a person doesn't

10 have the authority to consent. And I cited what amounts to a
11 laundry list of cases which are somewhat in the area of the
12 battered spouse area. That repeatedly show that even in cases
13 where a spouse did not have the key and was gone from the
14 property for months and months and months, that that spouse
15 still had the authority to consent. Now, even if you wanted to
16 separate the spousal cases out, the Snype case pretty much lays

17 out what your test is for whether a person has the authority to
18 consent. That test is, number one, access. And then any of
19 the following three. Either common authority, substantial
20 interest, or permission to gain access. Under the Snype test,

21 separate and apart from the analysis of whether Ms. Fischer
22 qualifies I guess as a spouse, under the Snype test you still

23 have more than enough in the record to conclude that she had
24 the authority to consent to the search.

25 THE COURT: When they went into the basement and

1 found the materials consistent with methamphetamine production,
2 and then they obtained the search warrant, and then they went

3 back to the house, just by way of rounding out my background
4 knowledge, what more did they find when they went back than
5 they found when they were there on the consent search?

6 MR. TRABOLD: I think it's not so much more as it is
7 it is a greater ability to analyze what was there. Because in
8 a meth situation when you go in, they went in on a consent
9 search, they go in there and they kind of -- I don't want to
10 say they do a cursory look because it's a little bit more than
11 that because they're trying to determine exactly what it is
12 that might be there. But what I mean is once they're able to
13 determine hey, it looks like we have what amounts to a meth lab
14 or what may be a meth lab, their mode of operation is to
15 quickly get out of the area for safety purposes.

16 THE COURT: Then come back and secure it?

17 MR. TRABOLD: Right, then come back with their
18 safety suits on and their breathing apparatuses on and secure
19 it under conditions where they know that their safety can at
20 least be assured as much as possible.

21 THE COURT: Was anything else found in his jacket of
22 an incriminating nature besides the sodium hypophosphite, do
23 you know from the record?

24 MR. TRABOLD: I don't think -- well, I don't know if

25 the record indicates more in his jacket being found other than

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1 the listed chemical.

2 THE COURT: The sodium hypophosphite?

3 MR. TRABOLD: Correct.

4 THE COURT: Is that what it was?

5 MR. TRABOLD: That was the listed chemical.

6 THE COURT: Is there anything else that you want to

7 tell me?

8 MR. TRABOLD: The last argument that we make finally

9 is that if the court is inclined to say that the consent, none

10 of this consent information can be validly sustained and the

11 consent was not valid, even in the circumstance where that

12 would be your conclusion, it's our position that the case law

13 requires you to take essentially all that what we'll call

14 tainted information out of the search warrant and then assess

15 whether there's enough in the warrant to justify the search

16 without that tainted information.

17 THE COURT: What would you be left with then?

18 MR. TRABOLD: What you would be left with is
19 information in this warrant that Mr. Price had distributed or
20 delivered methamphetamine to Agent Schirra in the past. That
21 he had been arrested on the day in question. That he had items
22 indicative of methamphetamine production on him, separate and
23 apart from the listed chemical found in his coat. And that
24 when --

25 THE COURT: Say that one to me again?

12

1 MR. TRABOLD: I think, I'm pretty sure, I apologize
2 I didn't look at the warrant right before I came down here.
3 But I think the warrant indicates -- there's no mention
4 whatsoever in the warrant of the sodium hypophosphite found in
5 the jacket, that's without question. But I think, again, if
6 I'm wrong I apologize, but I think the search warrant indicates
7 that at the time of his arrest, the arrest in the garage, Mr.
8 Price had items, separate and apart from the sodium
9 hypophosphite, on his person which are indictative of
10 methamphetamine distribution and/or production. And just by
11 way of example, I think one of the items would be pH papers,

12 which are commonly known to be used to determine acidity levels

13 in the production of methamphetamine.

14 THE COURT: Could it be that the sodium

15 hypophosphite that was found in the dresser drawer wasn't

16 included, but the sodium hypophosphite that was found in his

17 coat was?

18 MR. TRABOLD: No, it's definite that the stuff found

19 in the dresser drawer wasn't included. But I also don't think

20 there was any mention made of the chemicals found in the bag.

21 THE COURT: I'll just look at the affidavit again.

22 MR. TRABOLD: Sure. What you have is a person that

23 more than indicates distributed methamphetamine to Agent

24 Schirra, and on the day in question was arrested for that

25 offense. He had items indicative of involvement with

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1 methamphetamine on his person. Then they traveled to his

2 house, while at his house they found, I believe the warrant

3 indicates more than one pipe which would commonly be used to

4 ingest methamphetamine. It's our position that that

5 information in and of itself provides probable cause, separate

6 and apart from all the other information, to justify the search

7 of Mr. Price's house.

8 THE COURT: All right, thank you. Okay, Mr. Patton.

9 MR. PATTON: Your Honor, first starting with the

10 search at the garage on Marchmont Road. I think Myers is

11 controlling on you. And I also respectfully disagree with Mr.

12 Trabold's memory of what the record shows as to with regard to

13 where the coat was located. In actuality the record does not

14 state where the coat was located within this garage. Whether

15 it was in this back small office area --

16 THE COURT: I think that's correct. The only

17 geographic placement of the jacket, as I remember the record,

18 was within a few feet of the knapsack.

19 MR. PATTON: Correct. The record from the hearing

20 does not state whether that knapsack and coat were in the

21 office part of this garage or if that jacket and coat were out

22 in the main part of the garage. So that the government has not

23 established that the coat was within Mr. Price's area of

24 control at the time he was arrested. So there's a basic

25 failure to show factually that the coat was within Mr. Price's

1 area of control at the time of the arrest to justify a search
2 of it incident to arrest. And that given that absence of
3 evidence, the government hasn't met its burden of proving that
4 this was a valid search incident to arrest. With that
5 attitude, the Myers case says that your Honor would have to

6 find that the government hasn't established that this was a
7 valid search incident to arrest.

8 THE COURT: Let's go on to the other part.

9 MR. PATTON: At the house, and we're talking about
10 the initial consent or lack thereof. I believe the evidence
11 indicates, and both Agent Schirra and Trooper Wilson both
12 repeatedly stated that Ms. Fischer was told that they wanted to
13 search inside the house area for items indicative of the
14 manufacturing of methamphetamine. Saying that they needed to,
15 for safety reasons, see if there was anything like that in the
16 house, it was for the safety of Ms. Fischer and her children,
17 because they didn't want to see anybody get hurt. They did not
18 inform Ms. Fischer that she had the right not to consent. They
19 did not inform Ms. Fischer that anything found that could
20 incriminate either herself or Mr. Price would be used in fact

21 to try and incriminate Ms. Fischer or Mr. Price.

22 THE COURT: Didn't they tell her they had evidence

23 there was methamphetamine production going on?

24 MR. PATTON: They said that they had information

25 that methamphetamine activity had been occurring. I believe

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1 what the testimony was, was Ms. Fischer responded to that well,

2 Mr. Price and I use methamphetamine but we're not involved in

3 the manufacture.

4 THE COURT: Let me ask you this on the first

5 consent. Is it a separate contention of the defendant that the

6 consent should be vitiated solely on the basis of deceit?

7 MR. PATTON: Well, I can't say that, your Honor,

8 because there is no one factor that controls when you're

9 deciding whether or not --

10 THE COURT: It's a factor?

11 MR. PATTON: Correct, it is a factor. Schneckloth

12 makes very clear that you have to consider the totality of the

13 circumstances in deciding whether or not consent is voluntary.

14 There isn't any one particular factor that is dispositive one
15 way or the other. But it is our contention, as explained in
16 our brief, that if there is deception involved in obtaining the
17 consent, that is a factor; and if other factors are relatively
18 borderline as to whether it's voluntary or not voluntary, then
19 I think this is a factor that can cause you to say look, this
20 is a close case as to whether or not the consent is voluntary,
21 this deceit kicks it over the line into the nonvoluntary side
22 of the ledger.

23 THE COURT: Let's move it inside the door now?

24 MR. PATTON: Once they're in the bedroom, Agent
25 Schirra testified that he finds the two pipes. And then he

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1 says he finds in a dresser drawer a white substance. He was
2 then asked after you find that, what occurs between you and Ms.
3 Fischer. Agent Schirra's answer was, at that point I believe
4 she asked me to stop searching the house part because we found
5 that stuff and she thought she was going to get in trouble.
6 That is what he said. And what's critical, judge, is the
7 wording of it, the house part. Because if you recall, while

8 Trooper Wilson and Agent Schirra were outside the house with

9 Ms. Fischer asking for consent, they were asking for consent to

10 search the house for methamphetamine production items, but they

11 were also asking to search outside the house for a stolen ATV.

12 So they were asking for consent for the house and for outside

13 the house in this other detached garage area to search for the

14 ATV.

15 THE COURT: Did they find that?

16 MR. PATTON: The stolen ATV, yes. So what's

17 critical, you can see what Ms. Fischer is referring to when she

18 tells Agent Schirra I want to you to stop searching the house

19 part. She's given consent for the house and for outside. So

20 she's withdrawing the consent for searching the house. She is

21 not revoking consent to search outside for the ATV. And the

22 revocation of consent issue wasn't addressed in the initial

23 papers because there was nothing in the discovery provided to

24 us that discussed it. And so it's telling because Agent

25 Schirra didn't have any reason to be coached on it or prepared

1 for it, it's just a very natural what happens next. In

2 response to what happens next, where Agent Schirra is just
3 going off his memory, okay, what happened. We found this
4 stuff, she said she wanted me to stop searching the house part
5 because we found this and now I'm in trouble. I also would
6 submit to you that that ought to play into your consideration
7 when you're deciding the validity of the initial consent.
8 Because what does Agent Schirra say, he's like once she
9 realized that she could get into trouble --

10 THE COURT: Hold your thought just one second.

11 Hang on a second, I've got to give a message to my law clerk.

12 (Whereupon, a brief recess was taken.)

13 THE COURT: All right. Would you be so kind as to
14 restate your position as to why you felt that the scope of the
15 revocation of the consent was broader than interpreted by the
16 government?

17 MR. PATTON: Sure. Agent Schirra and Trooper Wilson
18 both testified that when they were speaking with Ms. Fischer
19 outside in front of the house initially trying to obtain
20 consent to search, they were trying to get consent to search
21 both the inside of the house for methamphetamine production
22 related materials, but they were also asking for permission to
23 search outside the house to look for a stolen ATV. So they

24 were asking for consent to search inside the house and they

25 were asking for consent to search the outside grounds and

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1 curtilage of the house. So when Agent Schirra testified at the
2 hearing that I believe she asked me to stop searching the house
3 part, what that is referring to is Ms. Fischer understanding
4 that she's given consent to search the house for one set of
5 materials, and she's also given consent to search the outside
6 of the house, the curtilage, for the stolen ATV. And so when
7 she's saying I want you to stop searching the house part, that
8 is revoking the consent she gave to search the house for
9 methamphetamine production materials. It could not be said
10 that she was revoking consent for the search outside of the
11 house that she had given, if you find that original consent was
12 valid, she was not revoking the consent to search outside of
13 the house. And that is why and, in particular the way Agent
14 Schirra explained it makes perfect sense in light of the manner
15 in which the consent was obtained from Ms. Fischer and the fact
16 that it was consent not only to search inside the house, but
17 also consent to search outside on the curtilage of the house.

18 THE COURT: But assume that the revocation was
19 objectively less than that and now move on to the basement?

20 MR. PATTON: I'm not sure I understand what you mean
21 when you say --

22 THE COURT: Well, if it was a flat out -- if it was
23 objectively reasonable for him to have concluded that she was
24 essentially saying get out of the house and including the
25 basement, then that's the end of the inquiry?

19

1 MR. PATTON: Correct.

2 THE COURT: My second point is, assume for the sake
3 of discussion that it was objectively reasonable for him to
4 conclude that the revocation meant house part and not basement,
5 run your argument from there?

6 MR. PATTON: Well, I would first argue that the
7 basement is part of the house. And I must say I mean if the
8 court wants to make a finding of fact and law that the basement
9 of a house is not part of the house, I'll feel pretty
10 comfortable talking to the Third Circuit about that. Because I
11 just don't see under any set of circumstances --

12 THE COURT: I think I just had a shell lobbed across
13 my bow.

14 MR. PATTON: Yes. Look, if you live in a house that
15 has a basement, the basement is part of the house. I put this
16 hypothetical to you. If someone had come to that house on Page
17 Road and broken into the basement, that person would have been
18 charged with residential burglary, because the basement is part
19 of the residence. And it is just common understanding that a
20 basement is part of a house. Whether you can access the
21 basement from inside the house or not.

22 THE COURT: Didn't she give a new consent?

23 MR. PATTON: She did not. What happened was that
24 she revoked the consent she gave, and then interestingly
25 enough, Schirra didn't keep looking around inside the house, he

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1 left, he went outside. Which I think is a pretty good
2 indication that he understood that she just revoked her consent
3 to search. Once she has revoked consent to search the house,
4 if the agents come back to her and are saying well, now we
5 still want to search, we want to search this area, gee, will

6 you give us permission to search the area, even if you agree to
7 that, that's not a free and valid consent, that is simply a
8 submission to government authority. She's already revoked her
9 consent. They asked for consent, she revoked her consent, and
10 now they're coming back at her and saying well, we want to
11 search this. That is not, you're not starting at point zero
12 from there. All that is Ms. Fischer is saying, look, if you're
13 going to search, you're going to search. And it's a submission
14 to government authority. And they've already made it clear,
15 she's already told them I'm revoking my consent, now they're
16 coming back at her trying to get another consent for the same
17 area that she just revoked consent for. And so to the extent
18 that any consent was given, it was not free and voluntary under
19 those circumstances where you have, even if you find consent
20 was originally given, if consent was then revoked and the
21 government says well, okay, but we really, really want to
22 search this, so give us permission to search the area that you
23 just revoked your consent with respect to, that is not a
24 consent given in response to that situation, it's not free and
25 voluntary.

1 THE COURT: What's left of the warrant, then, I mean

2 Mr. Trabold takes the position that -- that affidavit in

3 support of the probable cause, absent tainted information,

4 still contains sufficient information to support probable

5 cause?

6 MR. PATTON: Two responses to that. First, just

7 factually I think that's just wrong. The warrant --

8 THE COURT: Do you have the warrant?

9 MR. PATTON: I have it in front of me. After the

10 warrant gives the standard I'm a law enforcement officer, I've

11 investigated methamphetamine, then the affidavit in support of

12 the warrant states that on April 5th of 2002, so you're talking

13 we're on October 5, 2004, at the date this affidavit is being

14 written and presented to Judge Baxter, it says on April 5th of

15 2002, Mr. Price sold, allegedly sold Agent Schirra

16 methamphetamine. So this is two years, over two years in the

17 past. The affidavit then says that Mr. Price had been arrested

18 on Marchmont Road in Erie County. And upon his arrest, he was

19 found to be in possession of items indicative of

20 methamphetamine trafficking, including plastic baggies with

21 methamphetamine residue and pH papers used to gauge the acidity

22 of the methamphetamine production process.

23 THE COURT: Were those found in his coat?

24 MR. PATTON: It's not clear where those were found.

25 THE COURT: Do they say anything about the sodium

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1 hypophosphite that was in his coat?

2 MR. PATTON: They do not refer to sodium

3 hypophosphite that was found in the coat.

4 THE COURT: Just hypothetically, then, you move to

5 suppress the sodium hypophosphite in the coat, and if I

6 suppress that, is that kind of like an academic victory in

7 sound and fury signifying nothing in terms of -- where does

8 that get you? I'm not saying you may not be entitled to have

9 that suppressed, but it never found its way into the affidavit,

10 so how does it go into the equation?

11 MR. PATTON: Because if you would find that it was

12 found -- one of the charges against Mr. Price is possessing

13 sodium hypophosphite, a list I chemical --

14 THE COURT: There was a separate charge of

15 possession of that. All right, I understand.

16 MR. PATTON: The affidavit states that after Mr.

17 Price was arrested at Marchmont Road, Schirra went to Price's

18 residence at 8350 Page Road in Wattsburg. And that it talks

19 about getting consent to search. Then it says that Ms. Fischer

20 consented and that Agent Schirra and Ms. Fischer went into the

21 bedroom and that several glass pipes with residue that your

22 affiant knows from experience are used to ingest controlled

23 substances were found. Everything after that point is all the

24 stuff from the basement. So the only evidence that they had to

25 support a search of the house for a methamphetamine lab --

23

1 THE COURT: Would the pipes themselves, though,

2 support a possession charge; because one of the charges was

3 just possession, right?

4 MR. PATTON: No. The warrant said that there was

5 probable cause to believe that Mr. Price was manufacturing

6 methamphetamine at his house. And they wanted permission to

7 search the house for evidence of methamphetamine production.

8 THE COURT: I think you're right. The focus was on

9 meth production relative to the warrant?

10 MR. PATTON: Correct. So there's basically three
11 things that would remain in the warrant. That two-and-a-half
12 years ago Mr. Price allegedly had sold methamphetamine to Agent
13 Schirra. Which doesn't say anything about Mr. Price
14 manufacturing methamphetamine. There's information that when
15 Mr. Price was arrested at the Marchmont Road garage, he had
16 plastic baggies and pH paper on him at that location. Then at
17 this completely separate location, the house, there were found
18 a couple of pipes that can be used to ingest methamphetamine.
19 I would submit to you that that evidence is not sufficient to
20 support a search warrant for the Page Road address for evidence
21 regarding the manufacturing of methamphetamine. What they
22 asked to search for was -- they were looking for a meth lab is
23 what they were talking about, what they were looking for. And,
24 again, the sodium hypophosphite, neither the sodium
25 hypophosphite from the Marchmont Road garage, nor the sodium

24

1 hypophosphite allegedly found in the bedroom are mentioned
2 anywhere in the warrant.

3 THE COURT: But those did form the basis of a

4 separate possession charge -- is that right, Mr. Trabold?

5 MR. TRABOLD: No, the possession charge in the

6 indictment is related to, it can include the sodium

7 hypophosphite found during any arrest of him. But the sodium

8 hypophosphite principally includes the sodium hypophosphite

9 found in the basement.

10 THE COURT: All right.

11 MR. PATTON: So factually I would submit to you that

12 there would not have been enough evidence in the affidavit to

13 support the issuance of a search warrant. Legally I would

14 argue to you, as we argued in our brief, that you cannot use

15 the inevitable discovery doctrine to justify a warrantless

16 search that violated the Fourth Amendment. It cannot later be

17 justified by saying well, we could have went and got a warrant

18 if we wanted to and, therefore, we would have inevitably

19 discovered this evidence. Because then you're making the

20 warrant requirement meaningless.

21 THE COURT: You're preaching to the choir on that

22 point.

23 MR. PATTON: I would like to back up, your Honor, on

24 whether or not Ms. Fischer had authority to --

25 THE COURT: To go into the basement?

25

1 MR. PATTON: Yes, consent to a search of the
2 basement, either actual or apparent, to the extent that that's
3 going to play a role in the court's decision. The entire basis
4 for third-party consent is the belief that if two people
5 mutually use property and have mutual access to it, they each
6 assume the risk that the other may let somebody else into that
7 area. That is the rationale for third-party consent laid out
8 by the Supreme Court in United_States_v._Matlock.

9 THE COURT: Didn't the Supreme Court just decide a
10 case on that or was that --

11 MR. PATTON: The Supreme Court in a case called
12 Georgia_v._Randolph, just dealt with the consent issue. Now,

13 in that case Mr. Randolph was home, Mrs. Randolph was home,
14 they were estranged. Mrs. Randolph had been out of the house,
15 they were separated, but Mrs. Randolph was back at the house.
16 The police come to the house. Mrs. Randolph is saying hey,
17 he's got some cocaine and some stuff upstairs, it's okay with

18 me if you search. Mr. Randolph is standing there at the
19 same time saying hey, I'm not giving you permission to search.

20 And the Supreme Court found that Mrs. Randolph's consent to
21 search could not trump Mr. Randolph's consent to search.

22 THE COURT: It wasn't an apparent authority case?

23 MR. PATTON: No. There was a passage in Randolph I

24 think that is appropriate. The Supreme Court said that Matlock

25 relied on what was usual and placed no burden on the police to

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1 eliminate the possibility of atypical arrangements. In the
2 absence of reason to doubt that the regular scheme was in
3 place. So police officers can presume that if a couple are
4 married or co-habiting, it is not unreasonable for police
5 officers to assume that each person has equal access to all
6 parts of the residence. But if the police officers learn
7 information that indicates to them that what is usual is not in
8 fact the case here, they cannot ignore that evidence and turn a
9 blind eye to it. So that if a couple, and it doesn't even have
10 to be couple, there is a case of a mother and a son. Mom had

11 access to son's bedroom but didn't have a key to the footlocker
12 that the son kept in his room. In that case the Fourth Circuit
13 said look, the mother has access to the room, so she can let
14 the police officers into the room, but she doesn't have access
15 to that footlocker. The son hasn't assumed the risk that the
16 mom will let someone look in the footlocker. And so mom can't
17 give consent. And the Fourth Circuit in another case that's
18 somewhat different, it was a computer, that two people equally
19 used the computer. But they each kept their files separate
20 from one another and had passwords protecting their files, that
21 the other did not know. The Fourth Circuit said look, neither
22 party has assumed the risk that the other person will have
23 access to their files because they kept them separate and they
24 password protected them. Which is the same as keeping them
25 locked.

1 THE COURT: How does those principles play out here?

2 MR. PATTON: The way that those principles play out

3 here is the situation that Schirra and Wilson are presented

4 with is Ms. Fischer saying well, I don't have a key to this,

5 Johnny has the key. And that her access to the basement is
6 only through Mr. Price. So yes, she has access to the basement
7 if Mr. Price allows her into the basement. But if he is gone
8 and has the key, she doesn't have access. And so there is no
9 way that this court can say that Mr. Price assumed the risk
10 that Ms. Fischer might permit the basement to be searched
11 because Mr. Price, with Ms. Fischer's consent, this was just
12 the arrangement they reached, was that that area was locked and
13 only he had access.

14 THE COURT: That was an outside man door, wasn't it,
15 and he didn't lock it, anybody could go down into the basement,
16 is that right?

17 MR. PATTON: True. Anybody, including Ms. Fischer.
18 The bottom line, judge, two people can create their living
19 arrangements however they want. And if the police know of
20 those living arrangements or reasonably ought to know those
21 living arrangements, they have to honor it. There wasn't any
22 apparent authority because she's saying well, if you can defeat
23 the lock that's on the door, you can search. No reasonable
24 person should accept that as a valid consent to search. Saying
25 hey, I don't have a key to get into this area, so I can't get

1 into it myself, but if you can beat the lock, be my guest and
2 search, that's not apparent authority.

3 THE COURT: All right, thank you. Do you have
4 anything briefly there, Mr. Trabold?

5 MR. TRABOLD: I do, your Honor. On this last point
6 if I could just address it. The record is not, does not in any
7 way, shape or form indicate that Ms. Fischer said she only had
8 access to the basement when Johnny or Mr. Price let her in.
9 That's not what the record indicates on pages 40 through 42.
10 Despite counsel's withering cross-examination to try and get
11 the agent to indicate that, the agent at no time indicates that
12 Ms. Fischer said she only had access to the basement if Mr.
13 Price let her in. In fact, the bear facts of the record
14 completely contradict that unless the court was to conclude
15 that every time she did laundry she had to seek Mr. Price out
16 in order to let her into the basement. So the record does not
17 indicate that she did not have apparent authority. However,
18 what may be the most important point of this case because it
19 can be case dispositive, separate and apart from whatever else

20 you decide, the search warrant does not indicate that the

21 officers were only seeking evidence of a methamphetamine lab.

22 It indicates very clearly the following:

23 "Wherefore, based upon the foregoing, I have

24 probable cause to believe that located at the property and

25 premises known as 8350 Page Road, Wattsburg, Venango Township,

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1 Erie County, on which is located a single-family one-story

2 range-style residence," and then it indicates there is

3 presently the following evidence:

4 "(1). Methamphetamine and any other illegal

5 controlled substance, any and all devices used to store,

6 manufacture and/or ingest methamphetamine or any controlled

7 substance."

8 And then it goes on to indicate a variety of other

9 items, ten paragraphs of items that the officers are seeking to

10 find in the residence, and that they believe they have probable

11 cause to find, or that will be located there. So the warrant

12 does not indicate that the officers believe they have probable

13 cause and are only seeking a methamphetamine production lab.

14 The warrant indicates the officers, by what they've laid out,
15 believe they have probable cause to believe that located in the
16 residence will be just the bear controlled substances, as well
17 as materials that may be used to ingest those controlled
18 substances. Separate and apart from any manufacturing process
19 or packaging up facility or anything like that. From this
20 warrant there can be no question that there is probable cause
21 to conclude, if you take out the tainted evidence, that Mr.
22 Price has items in his home used to ingest controlled
23 substances.

24 THE COURT: Namely the two pipes?

25 MR. TRABOLD: Namely the two pipes. The pipes

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1 aren't the only evidence that is indicative of that because the
2 warrant plainly indicates that when Mr. Price is arrested, he
3 has items, without any mention of sodium hypophosphite, he has
4 items indicative of methamphetamine distribution. And the
5 warrant indicates that quite clearly. It indicates -- this is
6 at paragraph six of the warrant. "Upon his arrest, Price was
7 found to be in possession of items indicative of

8 methamphetamine trafficking, including plastic baggies with
9 methamphetamine residue and pH papers used to gauge the acidity
10 of the methamphetamine production process." So at a minimum in
11 this case what you have when you've removed the tainted
12 evidence, is a warrant which seeks to enter somebody's home for
13 evidence of just plain controlled substances and/or items to
14 used to ingest them and in support of that says we had an
15 arrest warrant for this individual for distributing controlled
16 substances to the affiant listed in the warrant.

17 THE COURT: Is it illegal to have, if all you have
18 are pipes, are those illegal?

19 MR. TRABOLD: Yes, in Pennsylvania that's the
20 possession of drug paraphernalia. So the warrant indicates we
21 arrested this individual who we had a warrant on for
22 distributing methamphetamine to the affiant. When we arrested
23 him, he had these items indicative of methamphetamine
24 trafficking. When we went to his house, we found pipes which
25 your affiant through his experience knows are used to ingest

1 controlled substances.

2 THE COURT: Are you saying that two pipes alone, if

3 that's all there was, would have supported a search of the

4 premises?

5 MR. TRABOLD: Without question. Because they say

6 right in here that one of the things they're searching for is

7 controlled substances and/or items used to ingest controlled

8 substances. Those are two of the items they were seeking to

9 find in this search warrant. When you find drug paraphernalia

10 in somebody's house, that in and of itself gives you enough to

11 search their house for those types of items.

12 So separate and apart from any consent, the warrant

13 contains sufficient evidence, even if you remove all of the

14 items that are arguably tainted, to search Mr. Price's house.

15 Just a couple other points, and I know we've got

16 briefs and we have belabored it. Counsel says it's obvious

17 that Agent Schirra knew that the consent had been revoked

18 because he immediately left the house. Well, that is a gross

19 distortion of the record. Because the record indicates that

20 Agent Schirra, upon the limitation of consent asked Ms. Fischer

21 where's the basement. She then took him, she led him outside

22 the house and then to the basement man door. To say that he

23 left the house because he knew that she had basically kicked

24 him out of the house is plainly distorting the record.

25 This is not so cut and dry of a situation with

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1 regard to the basement being in the house and this type of
2 thing, for several reasons. First of all, what Agent Schirra
3 says is she told me she didn't want me to search the house
4 part. And then when counsel cross-examines him further, he
5 specifically says she told me she didn't want me to search the
6 house part upstairs. And counsel wants you to basically decide
7 this case on only the portion of the factual record in this
8 case that supports his argument. You have to look at the
9 entirety of the record in this case.

10 THE COURT: It's a single-family dwelling, it's a
11 one-level house, right, it wasn't a two-story?

12 MR. TRABOLD: Well, it's a single-family dwelling,
13 but you have to go downstairs and around to get to the
14 basement. So to say that it is cut and dry and he'd love to
15 take this case in front of the Third Circuit, well, that may be
16 the case, but the record is what the record is. You can't
17 argue for suppression and then attempt to limit the focus of

18 what an agent said solely to that portion of the record that
19 benefits you.

20 THE COURT: It's your view that it is objectively
21 reasonable to view the house part as the house itself but not
22 the basement?

23 MR. TRABOLD: But not the basement. Precisely
24 because you can't access the basement from the house, the
25 basement is below the house. What we cannot get away from is

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1 what the agent testified to, and with no other evidence to the
2 contrary of what was actually said by Ms. Fischer. So you
3 can't just look at it and say well, this is what is included
4 here, therefore, we're going to ignore what the agent actually
5 said and we're going to try to parse out and limit what we want
6 the court's focus to be.

7 THE COURT: All right.

8 MR. TRABOLD: The only other point I want to raise
9 is, again, this is not the usual situation where the basement
10 is so clearly part of the house. Because you have a basement
11 where you can't access it from inside the house.

12 THE COURT: Did he know that -- does the record
13 reflect one way or the other what he knew about the
14 configuration of the property insofar as it relates to how you
15 would get into the basement?

16 MR. TRABOLD: I don't think the record indicates
17 that prior to going there they necessarily had knowledge that
18 you can't access the basement from inside the garage. Just
19 finally, there is no evidence in this record that should cause
20 the court to conclude that the agents, even in the slightest
21 regard, tried to overcome or overbear Ms. Fischer's will with
22 regard to the consent to search the basement. I argue in the
23 brief and I think it's extremely valid, if anything, they're
24 honoring of her limitation of the first consent should have
25 made it very, very clear to her that she was the one running

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1 the show. Whatever she said went. She didn't have to merely
2 acquiesce to their authority. And the claim that they made a
3 claim to lawful authority, all of those cases in that area
4 surround the general proposition of an agent saying well, we're
5 just going to get a search warrant and really if you don't

6 consent, it's really of no consequence. There is nothing in
7 the record that indicates that that's what happened here.

8 Thank you.

9 THE COURT: I just have one last question for you
10 there, Mr. Patton, if you could come on up here maybe it's
11 easier to be heard. What about Mr. Trabold's point where he's
12 reading from the preamble to the affidavit that it would be --
13 that it is broad enough to subsume not only a search looking
14 for a meth lab, if you will, but a search simply looking for
15 drug paraphernalia?

16 MR. PATTON: Well, that doesn't justify -- even if
17 you would find they could have got a warrant to search just
18 for --

19 THE COURT: Pipes or whatever?

20 MR. PATTON: For pipes or whatever, that doesn't
21 vitiate the illegal search that led to what was found in the
22 basement. And it goes back, judge, to the legal argument that
23 even if you believe they could have gotten a warrant to search
24 the house, based on the information that they had, any time
25 prior to the illegal search, that fact cannot post hoc be used

1 to save evidence that was found during an illegal search. If
2 you let them do that, you are saying any time you have probable
3 cause to get a search warrant, you don't have to get the search
4 warrant because you can search without the warrant in violation
5 of the Fourth Amendment, and then simply go to court and say
6 well, judge, so what, we violated the Fourth Amendment rights,
7 all we would have had to do was go and get a warrant, and we
8 could have then searched and found this stuff. So no harm no
9 foul.

10 THE COURT: If you take out all the other stuff
11 beyond the two pipes as being tainted, couldn't the cops have
12 searched the entire place, including the basement, for pipes?

13 MR. PATTON: Not with the same intensity that they
14 searched for. The scope of the search is limited to what you
15 are searching for. And I don't believe that it is at all
16 reasonable to believe that if you're looking for evidence that
17 there is drug paraphernalia in the house and all you're looking
18 for is drug paraphernalia, that is stuff that's used to
19 actually ingest drugs, that you are going to go through the
20 basement of a house looking through closed garbage bags and the

21 like, what Trooper Wilson and Agent Schirra claim that they

22 intentionally looked through in the basement.

23 THE COURT: Do one of you have the affidavit handy?

24 MR. PATTON: Yes. And it's part of the record.

25 THE COURT: It's part of the record, but just for my

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1 convenience. I'll tell you what I'm going to do. I wasn't

2 sure when I came out here this morning whether I was going to

3 rule on the record or not, and I'm not sure. I want to go talk

4 to my law clerk for a few minutes. And I'm going to either

5 come out and tell you that I don't think I can rule on the

6 record or I'm going to tell you that I'm going to rule on the

7 record, but I don't know which.

8 MR. PATTON: Your Honor, there's a picture of the

9 house with the warrant.

10 THE COURT: Is that part of the affidavit?

11 MR. PATTON: Yes.

12 THE COURT: All right, I'll take a look at that.

13 We're in recess.

14 (Recess taken from 11:28 p.m.; until 1:30 p.m.)

15 THE COURT: All right, I am going to give you an

16 opinion. This is going to be an order.

17 ORDER

18 Defendant moves to suppress the fruits of a
19 warrantless search conducted on October 5, 2004. As a result
20 of the discovery of materials connected with methamphetamine
21 production, the agents obtained a search warrant, the execution
22 of which resulted in the seizure of chemicals used to
23 manufacture meth. Defendant argues, in essence, that the
24 consent to search given by the defendant's girlfriend,
25 Ms. Fischer, was not voluntary. See Schneckloth_v._Bustamonte,

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1 412 U.S. 18, 248-49 (1973).

2 Defendant also moves to suppress a bag containing
3 sodium hypophosphite found in the defendant's jacket at an auto
4 garage on October 5, 2004. With respect to this seizure,
5 defendant argues that it runs afoul of the teaching of
6 United_States_v._Myers, 308 F.3d 251 (3rd Cir. 2002), in that

7 the defendant was not in proximity to his jacket and had been

8 handcuffed at the time of the search of his jacket.

9 First, based on the testimony and exhibits received
10 at the hearing, I set forth in narrative form my findings of
11 fact, as well as conclusions of law.

12 Subsequent to arresting the defendant, the
13 circumstances of which will be described more fully later,
14 Agent Schirra, Trooper Wilson and Agent Albeck proceeded to the
15 defendant's residence. They were met at the door by a
16 14-year-old girl and a 9-year-old boy, the defendant's
17 children.

18 Let me just clear something up right now so we don't
19 have a problem where there's not an issue on appeal. Whose
20 natural children were these, does the record reflect; do you
21 know, Mr. Trabold?

22 MR. TRABOLD: I think the record reflects that
23 they're Mr. Price's children.

24 MR. PATTON: Your Honor, both children are the
25 natural children of Mr. Price; the young boy is the child of

1 Ms. Fischer with Mr. Price.

2 THE COURT: Let me just say this -- we're back on
3 the opinion. When the police officers went to the door, they
4 were met at the door by a 14-year-old girl and a 9-year-old
5 boy. As Ms. Fischer was not home and Mr. Price was under
6 arrest, they called Ms. Fischer, after obtaining her work phone
7 number, and they told her to come home. In route she
8 apparently ran out of gas in close proximity to the house,
9 which required one of the officers to go and pick her up at the
10 end of the road and bring her back to the house, which he did.
11 When she arrived, it was explained to her that Mr. Price was
12 under arrest for a previous delivery of methamphetamine, and
13 she was further advised that they had information that he was
14 involved in the manufacturing of methamphetamine at the house,
15 and Agent Schirra informed her that they wanted to make it safe
16 for the children. Agent Schirra asked for her consent to
17 search the house and she provided verbal consent. The officers
18 at the time of the conversation concerning the search of the
19 house did not have their guns drawn. She was not verbally or
20 physically threatened. Only one of the officers was with Agent
21 Schirra when he obtained consent. I find that the atmosphere
22 surrounding the encounter was not hostile, and as previously
23 indicated, one of the officers had driven her to the residence

24 after her car problem.

25 I also note she was an adult apparently of average

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1 intelligence, who had previous experience with the criminal
2 justice system by virtue of a prior criminal record. Although
3 she was not advised of her right to refuse consent, as will be
4 discussed more fully below, her subsequent revocation of
5 consent indicates her awareness of that right.

6 I finally note that Ms. Fischer was not in custody
7 when she consented to the officers' search of the residence.

8 As stated in United_States_v._Kim, 27 F.3d 947

9 (3rd Cir. 1994):

10 "As the Supreme Court instructed, when a prosecutor
11 seeks to rely upon consent to justify the lawfulness of a
12 search, he has the burden of proving that the consent was, in
13 fact, freely and voluntarily given." Schneckloth, 412 U.S. at

14 222. "Whether a consent to a search was in fact 'voluntarily'
15 or was the product of duress or coercion, express or implied,
16 is a question of fact to be determined from the totality of all

17 the circumstances." Id. at 227. "Thus whether consent was

—

18 given is to be resolved by examining all relevant factors,

19 without giving dispositive effect to any single criterion.

20 Certain factors that courts consider in determining whether

21 confessions were voluntary, such as the age of the accused, his

22 education, his intelligence, whether he was advised of his

23 constitutional rights, and whether the questioning was repeated

24 and prolonged are relevant to our examination." That's at page

25 955.

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1 Here, applying this legal standard to the facts that

2 I have set forth more fully above, I find that the initial

3 consent to search the house was voluntary.

4 Returning to the factual narrative. After the

5 consent was given, Agent Schirra followed Ms. Fischer into the

6 house, while Trooper Wilson stayed outside. She unlocked the

7 bedroom door voluntarily and informed Agent Schirra that they

8 do use methamphetamine and there might be some "pipes" in

9 there. The record reflects that while searching the bedroom

10 shared by Price and Ms. Fischer, Agent Schirra found a couple
11 of glass pipes, as well as a bag containing a white crystal
12 substance, which Agent Schirra believed to be sodium
13 hypophosphite, a chemical precursor to methamphetamine.
14 Upon discovering these items, Agent Schirra indicated to
15 Ms. Fischer that this evidence was consistent with the
16 manufacturing of methamphetamine and that there was sufficient
17 probable cause to charge her with that offense. Agent Schirra
18 testified that "at that point -- I believe she asked me to stop
19 searching the house part. Because we found that stuff and she
20 thought she was going to get into trouble." (Transcript at 13.)
21 Price argues that this exchange reflected an intent by her to
22 revoke in its entirety any prior consent to search. The
23 government agrees that Ms. Fischer manifested an intent to
24 revoke her consent, but it claims that the revocation was only
25 partial and therefore did not affect Agent Schirra's subsequent

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1 search of the basement area.

2 It is well recognized that a person consenting to a

3 search may limit the scope of that search or even retract it

4 all together. See *Florida_v._Jimeno*, 500 U.S. 248, 252 (1991);

5 *Painter_v._Robertson*, 185 F.3d 557, 567 (6th Cir. 1999).

6 See also Kim, "when an official search is properly

7 authorized -- whether by consent or by the issuance of a valid

8 warrant -- the scope of the search is limited by the terms of

9 its authorization." Quoting *Walter_v._United_States*, 447 U.S.

10 649, 656 (1980). Once consent is revoked, the police may not

11 thereafter continue to search in reliance upon the earlier

12 consent. *United_States_v._Lattimore*, 87 F.3d 647, 651,

13 (4th Cir. 1996).

14 Here, the parties dispute as to whether Ms. Fischer

15 partially or completely revoked any consent previously given

16 for the search is borne of an ambiguity in Agent Schirra's

17 testimony. He initially testified that, subsequent to his

18 discovery of the glass pipes and suspected sodium hypophosphite

19 in the bedroom, Ms. Fischer asked him to stop searching "the

20 house part." (Transcript at 13). However, upon further

21 examination by this court, Agent Schirra somewhat refined his

22 testimony, stating that Ms. Fischer had actually indicated she

23 didn't want him searching "the bedroom anymore. She didn't

24 want me going through any more drawers in the bedroom."

25 (Transcript at 21).

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1 Defense counsel subsequently tried to flesh out this

2 ambiguity:

3 "Q. So you start looking through the dresser

4 drawers, you find what you believe to be sodium hypophosphite?

5 "A. Correct.

6 "Q. At that point Ms. Fischer says I want you to

7 stop searching?

8 "A. Searching the drawers, yes, she didn't want

9 me going through any more dressers.

10 "Q. Well, here's the confusing thing for me,

11 Agent Schirra. On direct the first time you were asked about

12 this, you stated she told us she didn't want us to look in the

13 house anymore. When Mr. Trabold asked you about it the first

14 time, that was your response. How did you go from she told us

15 she didn't want us looking in the house anymore to, well, no,

16 she just told us that she didn't want us searching any dressers

17 in the bedroom?

18 "A. Then I misspoke with Mr. Trabold. She did

19 not want me going through any more dressers in that bedroom.

20 "Q. She didn't say I just don't want you looking

21 around in the drawers of my house anymore, she said I don't

22 want you looking in the house anymore?

23 "A. No, she actually said I don't want you going

24 through any more drawers.

25 "Q. But after you find the sodium hypophosphite,

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1 she realized she's in trouble and you tell her that she's in

2 trouble, she told you to stop looking, correct?

3 "A. Correct, upstairs.

4 "Q. She didn't want you looking in the house,

5 correct

6 "A. Upstairs, yes."

7 Price contends that Ms. Fischer's words to Agent

8 Schirra reflected an unequivocal intent to revoke her previous

9 consent and thereby preclude any further search of the entire

10 residence, including the basement area which, Price contends,

11 is "obviously part of the house." (Defendant's brief at page 7

12 and Transcript at 42.) We do not agree that such a finding is

13 mandated on the record.

14 "The standard for measuring the scope of a suspect's

15 consent under the Fourth Amendment is that of 'objective'

16 reasonableness, what would the typical reasonable person have

17 understood by the exchange between the officers and the

18 suspect?" Kim, 27 F.3d at 956. Here, the uncontradicted

19 testimony from Agent Schirra shows that, at most, Ms. Fischer

20 articulated an intent to preclude further searching of "the

21 house part" of the residence. Agent Schirra interpreted that

22 to mean the upstairs living quarters of the home, and upon Ms.

23 Fischer's request, Agent Schirra immediately stopped searching

24 that portion of the residence. We note that the residence in

25 question is a single-family ranch-style home with a basement

1 area that is distinct from the upstairs living area. Thus, we

2 find Agent Schirra's interpretation of Ms. Fischer's request to

3 stop searching "the house part" to be objectively reasonable

4 and consistent with what a typical, reasonable person might

5 have understood given the context of the exchange.

6 Nevertheless, even if we were to find that Ms.

7 Fischer did revoke her original consent in its entirety, we

8 nevertheless conclude that she gave the agents a second valid

9 consent to search the basement. The evidence shows that upon

10 ceasing his search of the interior living quarters, Agent

11 Schirra inquired how the basement area is accessed. Ms.

12 Fischer indicated that the basement could only be accessed from

13 outside of the house. She then led Agent Schirra to an area on

14 the side of the house where there was a garage door and a man

15 door. Agent Schirra tried the man door and discovered it was

16 locked. Agent Schirra, who by now was joined by Trooper

17 Wilson, inquired whether Ms. Fischer had a key, and she

18 indicated that she did not, that Price had the key. The agents

19 then asked whether she had ever had access to that area, and

20 she responded affirmatively, stating that was where she does

21 her wash and where she kept Christmas supplies and other

22 declarations that were used throughout the year.

23 Agent Schirra then asked Ms. Fischer if he could

24 have permission to enter and search the basement area. And Ms.

25 Fischer indicated that if the agents could get in without

1 causing damage to the doors, then they could enter the
2 basement. Trooper Wilson then picked the lock with his knife,
3 and once the doors were opened, Agent Schirra asked for
4 permission to search the basement area. According to Agent
5 Schirra, Ms. Fischer said "go ahead." Once inside, Agent
6 Schirra discovered a plethora of contraband.

7 Price contends that Ms. Fischer did not validly
8 consent to a search of the basement because her so-called
9 "consent" was nothing more than a submission to police
10 authority. See *Florida v. Royer*, 460 U.S. 491, 509 (1983)

11 (government's burden of proving voluntary consent "is not
12 satisfied by showing a mere submission to a claim of lawful
13 authority."). Again, we do not agree.

14 As we previously noted, courts judge the validity
15 and voluntariness of a subject's consent under the totality of
16 the circumstances. This includes, as we previously outlined,
17 numerous factors bearing on the characteristics of the party
18 giving consent and the circumstances under which that consent
19 was given. Here, Ms. Fischer was a mature, middle-aged woman

20 of apparently at least average intelligence and education.

21 Through her prior criminal history, she had at least some prior

22 experience dealing with law enforcement officers. The

23 circumstances of the search were relatively low key and

24 untainted by any threats, promises or coercion on the part of

25 law enforcement. While there were numerous officers called in

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1 to secure the property, the majority were held off the premises

2 where they could not interfere with the searches or present any

3 unduly intimidating atmosphere. Agent Albeck remained in his

4 car, while only Agent Schirra and Trooper Wilson dealt directly

5 with Ms. Fischer. Though the officers were armed, their

6 weapons were not drawn and, in fact, Agent Schirra was in

7 plainclothes in an undercover capacity. There is no indication

8 from the record that the officers raised their voices or became

9 physically menacing. At no time was Ms. Fischer touched,

10 handcuffed, or placed in legal custody. In fact, she was not

11 only free to leave, she was encouraged to take her children to

12 the hospital for medical screening following the conclusion of

13 the search. The duration of the search does not appear to have

14 lasted for an unduly long period, and at no time were the
15 officers asked to leave the property.

16 The circumstances of Ms. Fischer's second consent
17 demonstrate that it was given voluntarily. At no time during
18 the second consent did Ms. Fischer articulate or intimate a
19 reluctance to allow the search of the basement. On the
20 contrary, at Agent Schirra's request, she led him to the
21 basement entrance. Agent Schirra explicitly asked permission
22 to enter and search that area; and Ms. Fischer gave express, if
23 conditional, consent (i.e., don't break the door). Neither
24 Agent Schirra nor Trooper Wilson represented that a refusal of
25 consent was futile or that a warrant would be obtained in any

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1 event. And although the officers never expressly informed Ms.
2 Fischer of her right to refuse consent, it is clear that she
3 understood that right, as she had previously exercised it
4 during Agent Schirra's search of the bedroom. While Price
5 contends that Agent Schirra's persistence merely demonstrated
6 that any refusal of consent was futile, we think that his
7 conduct in immediately ceasing a search within the upstairs

8 living quarters, upon her request, demonstrates that Ms.

9 Fischer did have an objective awareness of her right to limit
10 the agents' activities.

11 We recognize that Ms. Fischer ultimately refused to
12 sign a consent form memorializing her voluntary agreement to
13 the search. However, this is only one factor among many for
14 consideration, and in this case we do not view it as
15 dispositive. We also recognize that at the time she gave her
16 consent to search the basement, Ms. Fischer was aware that the
17 agents had found incriminating evidence in the bedroom, and
18 that Agent Schirra believed there was probable cause to charge
19 her with manufacturing methamphetamine. Though we do not
20 minimize this factor in our calculus, there is no indication
21 that the officers pressured or manipulated her with the use of
22 this information. There is no evidence, for example, to
23 suggest that the officers propagated the idea that, unless Ms.
24 Fischer acquiesced in the search of the basement, her legal
25 position would be worse or her property would be damaged.

1 Finally, Price makes much of the fact that the

2 officers supposedly used deceit in representing that their
3 primary interest was to protect Ms. Fischer and her children
4 from imminent physical danger posed by the presence of
5 chemicals on the property. While the agents were no doubt
6 interested in securing the contraband for purposes of their
7 criminal case, the evidence does not such suggest that they
8 were deceitful in representing concerns for the children's
9 safety. In fact, Ms. Fischer was specifically encouraged to
10 take her children off the premises for medical evaluation
11 following the discovery of hazardous chemicals in the basement.
12 Moreover, Ms. Fischer could not have been deceived by the
13 officers' failure to spell out the fact that their activities
14 might lead to the filing of criminal charges against Price
15 and/or Ms. Fischer. It was obvious from the outset that the
16 officers were searching for illegal methamphetamine production
17 and in fact, as previously indicated, so advised her.

18 Finally, Price contends that Ms. Fischer could not
19 have validly consented to the search of the basement because
20 she possessed neither actual nor apparent authority to grant
21 this consent. Again, we disagree.

22 The Supreme Court has recognized that even if a

23 third party lacks actual authority to consent to a search,
24 there is no Fourth Amendment violation if the police
25 mistakenly, but reasonably believe that the third party has

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1 authority to consent. *Illinois_v._Rodriguez*, 497 U.S. 177,

2 186 (1990). However, this standard is to be judged objectively
3 rather than subjectively:

4 Even when the invitation is accompanied by an
5 explicit assertion that the person lives there, the surrounding
6 circumstances could conceivably be such that a reasonable
7 person would doubt its truth and not act upon it without
8 further inquiry. As with other factual determinations bearing
9 upon search and seizure, determination of consent to enter must
10 "be judged against an objective standard: would the facts
11 available to the officer at the moment, 'warrant a man of
12 reasonable caution in the belief' that the consenting party had
13 authority over the premises?" *Id.* at 188.

14 We think the facts developed by the government
15 fairly establish that a reasonable officer in the position of

16 Agent Schirra would believe that Ms. Fischer had at least
17 apparent authority to permit the officers access to the
18 basement area. The evidence reflects that Price and Ms.
19 Fischer shared the residence in question with their children
20 and that Price referred to Ms. Fischer as his "wife."
21 (Transcript page 6.) Nothing about the facts of Agent
22 Schirra's initial interior search of the home suggested that
23 Ms. Fischer's authority over the residence was limited. Upon
24 arriving at the basement entrance, Agent Schirra discovered the
25 man door was locked and asked Ms. Fischer if she had the key.

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1 She indicated that she did not have the key and that Price had
2 the key. Although Ms. Fischer made some mention of Price
3 sometimes letting her into the basement area, it is not clear
4 from Ms. Fischer's statements to Agent Schirra whether Ms.
5 Fischer's exclusive means of access to that area was through
6 Price or whether Ms. Fischer on occasion also had independent
7 access to the basement. What is clear is that the basement was
8 utilized, at least in part, for laundry and storage purposes,
9 and that Ms. Fischer did have access to the basement to do her

10 laundry and retrieve Christmas supplies and other decorations.

11 We also find it significant that the basement was accessible

12 from the outside of the house and, thus, the fact that it was

13 locked could be consistent merely with a general intent to keep

14 out children or other intruders. Under these facts, we think

15 the record is sufficient at least to establish that Mr.

16 Fischer's apparent authority to consent to the basement search.

17 In light of this finding, we need not determine whether the

18 record would support a finding of Ms. Fischer's actual

19 authority to permit a search of the basement.

20 In sum we find, for all of the foregoing reasons,

21 that an objectively reasonable officer in Agent Schirra's

22 position would have concluded that Ms. Fischer voluntarily and

23 validly consented to the search of the basement,

24 notwithstanding the partial revocation of her original consent.

25 The government has therefore satisfied its burden of proving

1 that the warrantless search of the basement was valid.

2 Alternatively, though, even if the defendant is

3 correct that Ms. Fischer did not give a valid consent to the

4 warrantless search of the basement area, and thus assuming that
5 the contraband found in the basement area should not have been
6 included in the affidavit in support of the search warrant, we
7 nevertheless conclude that the warrant was independently
8 supportable by other information contained therein.

9 See United_States_v._Herrold, 962 F.2d 1131, 1138 (3rd Cir.)

10 We note that the search warrant covered not only evidence
11 pertaining to methamphetamine production, but also evidence
12 consisting of methamphetamine itself and any other illegal
13 controlled substance, as well as evidence pertaining to the
14 purchasing, transportation, maintenance, storage, distribution
15 and/or ingestion of methamphetamine. Even if all references to
16 the contraband found in the defendant's basement had been
17 excised from the search warrant affidavit, the affidavit still
18 includes information that: (1) the defendant had sold a
19 quantity of methamphetamine to Agent Schirra in April of 2002,
20 for which he was arrested on October 5, 2004, after eluding law
21 enforcement authorities for approximately two-and-a-half years;
22 (2) upon his arrest, the defendant was found to be in
23 possession of items indicative of methamphetamine trafficking,
24 including plastic baggies with methamphetamine residue and pH

25 papers; (3) evidence was found within the defendant's residence

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1 on October 5th that was consistent with the ingestion of
2 controlled substances, namely, several glass pipes with residue
3 which were found within a locked master bedroom. Agent
4 Schirra's affidavit further explains, based on his professional
5 experience and expertise, that persons engaged in the
6 distribution of methamphetamine often maintain various types of
7 documentation reflecting the acquisition, transportation, and
8 distribution of controlled substances, as well as proceeds and
9 expenditures of and for those activities, and they are known to
10 conceal in their residences and businesses caches of drugs,
11 large amounts of currency, financial instruments and other
12 tangible property, precious metals, jewelry, firearms and other
13 items of value, proceeds of drug transactions and evidence of
14 financial transactions, all of which are often secreted in
15 hidden compartments or buried underground or hidden in
16 vehicles. Thus, even if all references to the contraband found
17 in the basement area were excised from the affidavit, the court
18 finds that the affidavit would still support a broad search of

19 the premises for the evidence outlined in the warrant insofar
20 as it pertains to methamphetamine itself or other controlled
21 substances, and/or the storage, purchase, transportation,
22 distribution or ingestion of methamphetamine.

23 I now turn to the separate issue of the legality of
24 the search of the defendant's coat. The facts driving my
25 analysis of this search are as follows. Agent Schirra had

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1 information that the defendant was running a car garage on
2 Marchmont Road. He had an arrest warrant for Mr. Price based
3 upon a prior delivery of methamphetamine approximately two
4 years before. Agent Schirra and five other agents went to the
5 garage to arrest Mr. Price. One of the large overhead doors
6 was open and they entered through it. They observed Mr. Price
7 was the only one present and they found him in an office area.
8 He at this point was immediately handcuffed and removed from
9 the garage. After this was accomplished, one of the agents
10 observed a firearm magazine in plain view in the back of a
11 backpack believed to belong to one of Price's confederates.
12 Mr. Price's coat, which was lying next to the backpack, was

13 searched and a bag containing sodium hypophosphite was found.

14 I should note that there is no evidence that at the time of Mr.

15 Price's arrest, he was in the immediate proximity to the

16 jacket.

17 Defendant moves to suppress this evidence on the

18 basis of the holding of United_States_v._Myers. In Myers, the

19 court concluded that the search of a duffel bag belonging to

20 the defendant could not be justified as a search incident to

21 arrest when the defendant was lying face down, was handcuffed

22 and guarded by two police officers. In that case the defendant

23 was approximately three feet from his bag.

24 Myers teaches that in order to justify a search

25 incident to arrest of an object, such as the jacket here, there

1 must have been an objective basis upon which to conclude that

2 the warrantless search was necessary for the safety of the

3 officers or to prevent the destruction of evidence. In short,

4 Myers made it clear that the search incident to arrest is

5 subject to "both geographic and temperoral limitations."

6 Myers at 296.

7 Here, the defendant was outside the garage and
8 handcuffed at the time of the search of his jacket. In my view
9 this is not a close call given Myers. The search cannot be

10 justified on an objective basis as borne out of a concern for
11 officer's safety or to preserve evidence. Consequently, the
12 contraband found in the pocket as a result of that search, that
13 is the sodium hypophosphite, is suppressed. All right, that's
14 it.

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16 (Whereupon, at 2:01 p.m., the proceedings were
17 concluded.)

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C E R T I F I C A T E

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5 I, Ronald J. Bench, certify that the foregoing is a

6 correct transcript from the record of proceedings in the

7 above-entitled matter.

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12 _____

13 Ronald J. Bench

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